INDEX

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	3
Introduction	3
I. The Commission had power, on remand, to require refunds of the excess amounts collected under the prior judicially reversed order	5
II. The New York Commission's failure to seek a stay in the first-round appeal gave no rights to ODECO	10
CONCLUSION	15

TABLE OF AUTHORITIES

Airport Comm'n Forsyth County v. *C.A.B.*, 296 F.2d 95 (4th Cir. 1961) 11
Armour & Co. v. *Freeman*, 304 F. 2d 404 (D.C. Cir. 1962) 11
Associated Securities Corp. v. *S.E.C.*, 283 F.2d 773 (10th Cir. 1960) 11
Atlantic Refining Co. v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 (1959) 11
Atlantic Seaboard Corp., Op. 368, 28 FPC 860 (1962), rev'd, *Lynchburg Gas Co.* v. *F.P.C.*, 336 F. 2d 942 (D.C. Cir. 1964) 6
Atlantic Seaboard Corp., 33 FPC —— (Jan. 28, 1965) 6
City of Columbus v. *Public Utilities Commission*, 170 Ohio St. 105, 163 N.E. 2d 167 (1959) 10
Continental Oil Co., Op. 351, 27 FPC 96 (1962) 6, 14
Eastern Air Lines, Inc. v. *C.A.B.*, 261 F. 2d 830 (2nd Cir. 1958) 11
Hope Natural Gas Co., 28 FPC 958 (1962) 3

Page

Keco Industries, Inc. v. *Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957) 9, 10

Mandel Bros., Inc. v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954) 9, 10

Michigan Consolidated Gas Co. v. *F.P.C.*, 283 F. 2d 204 (D.C. Cir. 1960), cert. denied, 364 U.S. 913 .. 13

Pacific Telephone & Telegraph Co. v. *Public Utilities Commission*, 44 Cal. 1, 401 P. 2d 353 (1965) 9

Panhandle Eastern Pipe Line Co., Op. 269, 13 FPC 53 (1954), rev'd, *City of Detroit* v. *F.P.C.*, 230 F. 2d 810 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956) 5-6

Panhandle Eastern Pipe Line Co., Op. 269-A, 25 FPC 784 (1961), rev'd in part, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 305 F. 2d 763 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963) 6

Panhandle Eastern Pipe Line Co., Op. 269-B, 32 FPC 634 (1964), aff'd, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 348 F. 2d 340 (D.C. Cir. 1965) 6

Public Service Commission of New York v. *F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 373 U.S. 963 8

Shamrock Oil & Gas Corp., Op. 332, 22 FPC 882, rev'd, *Minneapolis Gas Co.* v. *F.P.C.*, 294 F. 2d 212 (D.C. Cir. 1961) 6

Shamrock Oil & Gas Corp., 26 FPC 943 (1961) 6

Socony Mobil Co., 27 FPC 347 (1962) 6, 14

Texaco Inc., 28 FPC 247 (1962) 6

Transcontinental Gas Pipe Line Co., Op. 315, 20 FPC 264 (1958), aff'd sub nom. *United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (3rd Cir. 1959), summarily rev'd sub nom. *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959) .. 6

Virginia Petroleum Jobbers Ass'n v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958) 11-13

United Gas Improvement Co. v. *Continental Oil Co.*, 381 U.S. 392 (1965) 15

MISCELLANEOUS:

Moody's Industrial Manual, June 1965 edition 5

Restatement, Restitution § 74 (1937) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 26

OCEAN DRILLING & EXPLORATION COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

QUESTION PRESENTED

Where, prior to completion of timely appeal proceedings challenging the Federal Power Commission's issuance of a certificate of public convenience and necessity, a natural gas producer elects to commence service under the certificate, which later is held invalid on the ground that the initial price thereunder is excessive, does the Commission, on remand, have power

to condition a properly priced certificate to require refunds of the excess amounts collected by the producer under the invalid certificate?

STATEMENT

On August 10, 1959, the Federal Power Commission, over the objection of the Public Service Commission of the State of New York, issued unconditional certificates to twenty-one gas producers—including Ocean Drilling & Exploration Company (ODECO), petitioner in No. 26—authorizing the producers to commence the sale of natural gas from Southern Louisiana fields at initial prices of 23.55¢ per Mcf to Hope Natural Gas Company, an interstate pipeline serving the Northeast, *Texas Gas Transmission Co.*, Op. 327, 22 FPC 378. On appeal, the Commission's action was reversed, *Public Service Commission of New York* v. *F.P.C.*, 287 F.2d 146 (D.C. Cir. 1960), cert. denied, *Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880 (1961), *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882 (1961), and the case was remanded to the Commission in April 1961.

In the meantime, however, and notwithstanding the pendency of the appeal, ODECO and the other producers had elected to commence service and were collecting the high initial price that was the basis for the legal attack on, and judicial invalidation of, the certificates. Following hearings on remand, the Commission, on July 23, 1963, determined that the maximum initial price at which these sales should have been certificated was 20¢ per Mcf, and to give effect to this finding it issued new certificates at that level and directed the producers to refund all amounts in excess

of 20¢ per Mcf which had been collected under the original, judicially invalidated certificates. Since ODECO had, during the pendency of the appeal and of the remanded proceedings, sold some 10,000,000 Mcf of natural gas at the 23.55¢-per-Mcf price pursuant to the invalid 1959 order, the Commission's order on remand would require ODECO to refund approximately $350,000 of the $2,350,000 it had collected prior to July 23, 1963 from its purchaser, Hope Natural Gas Company.[1]

On appeal by ODECO and others, the Court of Appeals for the Fifth Circuit, while reversing other aspects of the Commission's order, held that on remand the Commission had power to require refunds of "the fruits obtained under an invalid, that is illegal, order." *Callery Properties, Inc.* v. *F.P.C.*, 335 F.2d 1004 at 1019.

ARGUMENT

INTRODUCTION

By implication at least, ODECO seems to concede (1) that if the accepted principles of restitution apply, ODECO would be required to repay the excess moneys received under the judicially invalidated 1959 order, and (2) that if in the circumstances of this case the Commission had the power to provide for refunds, the Commission did not abuse its discretion in exercising that power here.

---

[1] ODECO's 23.55¢ charges to Hope were fully reflected in Hope's rates, and Hope is obligated to flow through to its customers any refunds and reductions it obtains from ODECO. See *Hope Natural Gas Co.*, 28 FPC 958 (1962).

But, says ODECO, the Commission lacks express power under the Natural Gas Act to require refunds,[2] and no such power need be implied here in order to protect the consumer, since the New York Commission, as the successful petitioner in the first-round appeal, could have assured its right to refunds by obtaining a stay pending appeal in the Court of Appeals for the D.C. Circuit.

Before responding to ODECO's arguments, we would like to set forth the doctrine from which ODECO asserts it should be exempted. Section 74 of the ALI Restatement of Restitution provides:

> "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess."

We do not understand ODECO to contend that the Commission's 1959 order was not reversed or set aside—or at least modified—by the D.C. Circuit. We do not understand ODECO to contend that it has contracted with the New York Commission or with the consumers it represents that the payments were to be final. And we are unable to find in ODECO's brief any

---

[2] Throughout its brief, ODECO refers to the refunds required by the order on remand as "retroactive refunds". Whatever the merits of this phrase as an emotional slogan, it is not a logical, or even a grammatical, concept: all refunds are retroactive (one wonders what "prospective refunds" would be), and while it may be argued that refunds are, in effect, retroactive rate reductions, this would, at best, make the term "retroactive refunds" a redundancy.

suggestion that refunds would be inequitable—unless the alleged "need for certainty" (Br. 20-21, 37) is interpreted as an equitable defense.[8]

I. The Commission Had Power, on Remand, to Require Refunds of the Excess Amounts Collected Under the Prior Judicially Reversed Order

So far as we are aware, it has been the Federal Power Commission's uniform practice, where consumer-type appeals have resulted in reversal of prior Commission orders which had approved increased rates under Section 4 or which had authorized contested initial rates under Section 7, to require, in ultimately disposing of the case on remand, that the proper rate be made effective as of the date it would have been effective had the Commission not erred the first time around (i.e., in a Section 4 proceeding, from the date the increased rate became effective, and in a Section 7 proceeding, from the date deliveries commenced). In all cases, this *nunc pro tunc* effect has been achieved by requiring refunds of excess moneys collected pursuant to the invalidated order.

Rate increase cases where refunds on remand were ordered are *Panhandle Eastern Pipe Line Co.*, Op. 269, 13 FPC 53 (1954), rev'd, *City of Detroit* v. *F.P.C.*, 230

[8] In discussing its desire for certainty, ODECO emphasizes that it is a "small producer" (Br. 21; see also Br. 3). While we think it clear that the Commission's order was valid for both large and small producers, ODECO's smallness is open to question. Moody's Industrial Manual, June 1965 edition, reveals (p. 2272) that in 1964 ODECO had assets of $35,234,734, revenues of $13,999,364, and after-tax profits of $2,174,459. The same source further reveals (pp. 2270-71) that ODECO is controlled by Murphy Oil Company, with whom it shares a number of officers and directors, and that in 1964 Murphy had assets of $175,497,491, revenues of $154,928,560, and profits of $4,253,824.

F.2d 810 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956); on remand, *Panhandle Eastern Pipe Line Co.*, Op. 269-A, 25 FPC 784 (1961), rev'd in part, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 305 F.2d 763 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963); on further remand, *Panhandle Eastern Pipe Line Co.*, Op. 269-B, 32 FPC 634 (1964), aff'd, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 348 F.2d 340 (D.C. Cir. 1965); *Shamrock Oil & Gas Corp.*, Op. 332, 22 FPC 882, rev'd, *Minneapolis Gas Co.* v. *F.P.C.*, 294 F.2d 212 (D.C. Cir. 1961); on remand, *Shamrock Oil & Gas Corp.*, 26 FPC 943 (1961). See also *Atlantic Seaboard Corp.*, Op. 368, 28 FPC 860 (1962), rev'd, *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir. 1964); on remand, *Atlantic Seaboard Corp.*, 33 FPC —. (Jan. 28, 1965).

Certificate cases where refunds on remand were ordered include *Catco* on remand—*Continental Oil Co.*, Op. 351, 27 FPC 96 (1962)—and the Socony Mobil portion of *Transco-Seaboard*[4]—*Socony Mobil Oil Co.*, 27 FPC 347 (1962). See also *Texaco Inc.*, 28 FPC 247 (1962), and orders set forth at R. 477-90.

It should be noted that in none of the above cases did the consumer representatives, who were the successful petitioners in the original appeals, seek a stay of the Commission's orders pending appeal.

In fact, ODECO cites no case, either under Section 7 or Section 4, where, following a successful consumer attack on a prior FPC order, the Commission, on

---

[4] *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958), aff'd sub nom. *United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (3rd Cir. 1959), summarily rev'd sub nom. *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

remand, has waived refunds. Nor does ODECO point to any case in which a court has set aside an FPC order on remand requiring refunds. Instead, ODECO cites (a) a line of federal cases which hold that where a regulated company has collected rates pursuant to a valid commission order, the commission may not thereafter require refunds on a showing that the rates were excessive, and (b) two state court cases in which it was held that under the state statutes there involved refunds could not be required of moneys collected, pursuant to an invalidated rate increase order, during the pendency of review proceedings.

As to the former—the so-called "filed rate" doctrine —both the Commission and the court below correctly pointed out that the doctrine has applicability only where the filed rate is itself final:

> "Our unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result [of the earlier timely appeals] have never assumed finality." 27 FPC 482 at 483; R. 411.
>
> "It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus ... refunds are proper." 335 F.2d at 1019; R. 638-39.

Although the instant case appears to be the first in which a natural gas company has challenged the Commission's power to require refunds of excess amounts collected under a prior Commission order which has

been judicially reversed, there is a helpful analogy provided by *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 373 U.S. 963. There, the New York Commission had appealed the FPC's failure, upon permanent certification, to order refunds of excess amounts collected pursuant to temporary certificates not containing an express refund condition. A group of producers, intervening in support of the Federal Power Commission's action, raised the "filed rate" doctrine urged here by ODECO; in holding the doctrine inapplicable, Judge Fahy stated:

> "The producers argue that in any event refunds may not be required because the Commission lacks power 'to set retroactive rates or award reparations,' citing Hope Natural Gas Co. v. F.P.C., 134 F.2d 287, 309-310 (4th Cir. 1943), rev'd on other grounds, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944). But there the Court was referring to the power of the Commission with respect to rates which had become unconditionally effective when filed, subject to being changed only prospectively in a proceeding under Sections 4 or 5 (a) of the Act. The Court was not ruling upon the power of the Commission to condition a permanent certificate by requiring refunds of excessive prices charged and received under temporary certificates. We think it is clear that a refund can be required when the temporary certificate is so conditioned. The serious question is whether it can be required when the temporary certificate is not so conditioned.
>
> "As to this the Commission itself, though it did not require refunds in these cases, does not disclaim the power. *The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a*

> *well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity.* The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates." 329 F. 2d at 249 (footnote omitted; emphasis added).

The two state court cases cited by ODECO—*Keco Industries, Inc.* v. *Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E. 2d 465 (1957), and *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954)—are clearly distinguishable.[5] First of all, of course, these decisions turned on the particular wording of the statute involved. As the very portion from *Keco* quoted by ODECO (Br. 25) shows, the Ohio court thought its ultimate result a proper one because the consumer's failure to recoup excess payments was balanced by the fact that, in Ohio, "a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped." But the same is decidedly not true under the

[5] Although ODECO introduces these two cases with an "e.g." symbol (Br. 24), they are apparently the only cases reaching this result. See *Pacific Telephone & Telegraph Co.* v. *Public Utilities Commission*, 44 Cal. 1, 401 P. 2d 353 at 364 (1965).

Natural Gas Act; under Section 4, a natural gas company may place in effect and collect its higher rates pending the outcome of the rate proceeding. As the quoted passage suggests, and as the passage which follows the quoted portion (not set forth by ODECO) makes perfectly clear, the rationale of the Ohio court's holding was that the Ohio legislature intended that a rate order of the Ohio Public Utilities Commission "stands on a different footing than the judgment or order of a court of law", 141 N.E. 2d at 469. The harsh and unfortunate results produced by *Keco* are illustrated by *City of Columbus* v. *Public Utilities Commission,* 170 Ohio St. 105, 163 N.E. 2d 167 (1959), where the Ohio Supreme Court, in a 4-3 decision, held that the Ohio statute did not permit a reviewing court to grant the type of stay which ODECO contends (Br. 28) that New York should have obtained in the first-round appeal here; both the majority and the dissent suggest the need for corrective legislation in Ohio.

Moreover, in both *Keco* and *Mandel*—in direct contrast to the present case—the commission on remand had *declined* to order refunds, and the state courts were sustaining the commission's action. Finally, both decisions involved rate increases—in contrast to the initial prices involved in the present case—and in *Mandel* the Illinois court specifically noted that a different result would have obtained had initial prices been involved, 117 N.E. 2d at 776.

II. The New York Commission's Failure to Seek a Stay in the First-Round Appeal Gave No Rights to ODECO

Seeking to avoid the charge that its retention of the excess moneys collected during the three-and-a-half years between initial delivery under the invalid order and the ultimate order on remand would, contrary to

the intent of Congress, "provide a windfall for the natural gas company with a consequent squall for the consumers",[6] ODECO argues (Br. 22-29) that Congress provided a specific and "exclusive" remedy to prevent such a windfall—the stay procedure in the first-round appeal—and that since the New York Commission failed to avail itself of this "exclusive" remedy, the Federal Power Commission erred in following the course it did (i.e., in ordering refunds).

ODECO's argument is without substance. The function of a stay pending appeal is not to determine the ultimate rights as between the parties—that, obviously, is the function of the decision on the merits—rather it is to provide interim relief in those situations where the equities require it. Clearly a stay is extraordinary relief, and it was almost certainly not available to the New York Commission in the earlier appeal; at any rate, a stay is not designed, as ODECO would have it (see Br. 28-29), to protect the party relying on the judgment under attack. Further, ODECO has shown absolutely no prejudice—not even hypothetical prejudice—from the fact that New York did not seek a stay.

The leading case on the availability and purpose of a stay is *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958)[7]—discussed by ODECO

---

[6] *Atlantic Refining Co.* v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 at 390 (1959).

[7] The *Virginia Jobbers* decision has been followed by the Courts of Appeals for the Second, Fourth, and Tenth Circuits, *Eastern Air Lines, Inc.* v. *C.A.B.*, 261 F. 2d 830 (2nd Cir. 1958); *Airport Comm'n of Forsyth County* v. *C.A.B.*, 296 F. 2d 95 at 96 (4th Cir. 1961); *Associated Securities Corp.* v. *S.E.C.*, 283 F. 2d 773 at 774-75 (10th Cir. 1960). See also *Armour & Co.* v. *Freeman*, 304 F. 2d 404 at 406, 408, 418 (D.C. Cir. 1962).

at Br. 27-28—where the court held that a stay was extraordinary relief whose issuance was influenced by four factors:

> "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?" 259 F. 2d at 925 (emphasis in original).

Although concluding that petitioner had shown "a probability of success on the merits of its appeal", the court in *Virginia Jobbers* nonetheless denied the stay because petitioner had failed to show irreparable injury in that, on reversal and remand, petitioner could be made whole. *Id.* at 926. While noting that the "question of harm to others if a stay were granted is not really before us", the court went on to observe that

> "the gas companies [whose certificates were under review by petitioner] must be aware that they are now proceeding at their own risk, and without a claim for relief from them, it is neither the petitioner's nor the court's place to protect them

from hypothetical, self-inflicted losses."[8] *Id.* at 927.

Even in a case where a stay would seem peculiarly appropriate—on appeal of an FPC order authorizing a pipeline to abandon its long-standing service to a major customer—the D.C. Circuit vacated its stay with a warning that the parties relying on the order under review would be acting "at their own risk until final disposition of the case." *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 at 209 n. 3 (D.C. Cir. 1960), cert. denied, 364 U.S. 913.

ODECO asserts (Br. 36) that New York's failure to seek a stay marked a departure from "the procedure commonly used by litigants contesting Commission orders". The statement is deceptive. Obviously, where the Commission reduces a rate and the natural gas company appeals, a reviewing court will frequently stay the reduction and refund, so that the fund in dispute will not disappear pending the outcome of the appeal. But where the consumer appeals from a Commission order *failing* to reduce rates, there is no danger that the fund will disappear, and we know of no cases—and ODECO cites none—where a consumer petitioner has received or even sought a stay pending appeal of a Commission rate order.

ODECO's contention that it was somehow prejudiced by New York's failure to request a stay is clearly without merit. ODECO takes the position (Br. 28)

---

[8] In this case ODECO's "losses" are, of course, nothing more than the requirement that *excess* amounts, as measured by the in-line level, be refunded. ODECO will still retain 20¢ per Mcf for all gas delivered under the invalid certificates—a price double the 1954 levels, and one substantially in excess of the average unit revenues of the producing industry today.

that the type of stay that would have been appropriate (1) would have permitted the sales to continue, just as if there were no stay, (2) would have permitted ODECO to collect the 23.55¢-per-Mcf price pending appeal, just as if there were no stay, but (3) would have required ODECO either to pay the moneys collected into escrow or expressly to agree to refund any excess upon the outcome of the litigation. Such a "stay", we submit, would be meaningful, and obtainable, only in the case of a potentially bankrupt natural gas company, which ODECO assuredly is not. ODECO's claim that it would, upon issuance of such a stay, "have been permitted to make an informed determination of whether to dedicate its gas to interstate commerce on such terms and conditions" (Br. 28) is disingenuous; ODECO had commenced service on December 4, 1959, five days *before* New York's petition for review was filed in the D.C. Circuit (and we do not understand ODECO to challenge the Commission's consistent rule that once service has commenced, it may not thereafter be discontinued for any reason, absent FPC approval under Section 7(b)). Thus ODECO was in no way prejudiced by the absence of the type of stay it contends should have been issued as a prerequisite to refunds.[9]

---

[9] For similar reasons, there is no merit to ODECO's contention (Br. 30-37) that, following the remand, the Commission should have vacated the original certificates and issued temporary certificates containing a refund provision—the procedure followed in the remanded *Catco* and *Socony Mobil* proceedings. Here again, had the Commission followed the procedure recommended by ODECO, ODECO would have had no option to accept or reject. But even more significant, perhaps, is the fact that in the remanded *Catco* and *Socony Mobil* cases the Commission ordered refunds of all excess amounts collected, without regard to whether the excesses were collected before or after the refund-provision temporary certificate had replaced the original unconditioned permanent certificate. *Continental Oil Co., supra,* 27 FPC at 109-10; *Socony Mobil Oil Co., supra,* 27 FPC at 349.

Finally, in view of ODECO's heavy reliance on the availability of a stay from the D.C. Circuit in the original review proceedings, it seems unfortunate that ODECO chose to take its appeal to the Fifth Circuit, thus eliminating the possibility that the initial reviewing court might clarify its position regarding a stay in these circumstances. As this Court recently remarked in a similar situation:

> "[I]n light of the fact that this case followed two different routes of appeal, thus eliminating the possibility that the initial reviewing court would clarify the extent of its mandate . . . it is appropriate to resolve doubts about the construction of the initial mandate in the Commission's favor." *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 at 405 (1965) (footnote omitted).

CONCLUSION

The decision of the court below, insofar as it sustained the Federal Power Commission's power to order refunds of excess moneys collected under the original invalid certificate, should be affirmed.

Respectfully submitted,

KENT H. BROWN, *Counsel*
55 Elk Street
Albany, New York

MORTON L. SIMONS
1815 H Street, N. W.
Washington, D. C.

Attorneys for Respondent

October 1, 1965